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### Can't We All Just Get Along? Competing for Client Confidences: The Integration of the Accounting and Legal Professions

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## CAN'T WE ALL JUST GET ALONG? COMPETING FOR CLIENT CONFIDENCES: THE INTEGRATION OF THE ACCOUNTING AND LEGAL PROFESSIONS

### INTRODUCTION

In recent years, business leaders have faced the types of increased challenges that will develop and likely persist amidst corporate management in the next century. These challenges have become more pervasive and more complex as companies have begun to rely on foreign markets, adjust to tighter labor supplies, adapt to technological advancements and manage significant business changes.<sup>1</sup> Corporate governance, nevertheless, requires leaders to juggle substantial business demands with paralyzing financial constraints and imposing political and social expectations.<sup>2</sup> In response to these developments, therefore, corporate managers have begun searching for sources of meaningful advice to assist them in making such challenging career decisions.<sup>3</sup>

The use of management consulting services as a means to counsel corporate leaders has grown exponentially over the past decade.<sup>4</sup> As a result of the management consulting phenomena, professionals with diverse backgrounds have leaped at the opportunity to become significant players in the market, and thereby obtain a piece of the lucrative consulting pie. Despite an array of market participants, however, two elite professions, which are themselves standing at the crossroads of change,<sup>5</sup> have emerged as formidable

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1. Ian Morrison, *Might As Well Run for President*, CHIEF EXECUTIVE, Aug. 1, 1997, at 72.

2. *Id.*

3. See Leonard M. Apcar, *In Peer-Group Discussions, Executives Lay Their Management Woes on the Table*, WALL ST. J., Aug. 21, 1985, at 27, proposing that many executives have developed round-table discussions with peers as an alternative to specialists and consultants. Moreover, Morrison, *supra* note 1, at 72, suggests that companies are being run by executives who are unable to think futuristically because their current positions have been based on past accomplishments rather than future abilities. Consequently, such business leaders are dependent upon continual external consultations.

4. MARK STEVENS, THE BIG EIGHT 41, 86 (1981).

5. See Mark Nelson, *Future Shock is Already Here*, OUTLOOK, Jun. 22, 1989, at 8, indicating that views of the future of the accounting profession consist of the CPA as "the most highly prized professional in all the world" where participants are able to comprehend global economics while simultaneously are capable of analyzing complex issues in very specialized areas. See also James F. Fitzpatrick, *Legal Future Shock: The Role of Large Law Firms by the*

opponents in search for the top spot on the consulting pyramid: the accounting profession and the legal profession.

These two contenders have converged on an area of professional service that has only recently been traversed. The accounting profession has realized that what have become the bread and butter of its area of expertise, audit and tax services, is more frequently commoditized, and that the services of the major market participants are almost indistinguishable. As a result, the accounting profession has experienced significant competitor consolidation and expansive service capabilities. The legal profession, on the other hand, has sought to expand the definition of "legal services" to include management consulting services, and then to protect such practices from encroachment by enforcing various professional rules and guidelines under the guise of unauthorized practice of law prohibitions.<sup>6</sup> All of this jockeying has occurred in the context of providing corporate managers with more meaningful and necessary advice. Consequently, these two old warriors presently stand toe to toe, stymied by questions of whether to continue their assault on innovative and undeveloped services, or whether to retreat to those areas that have comprised the historical makeup of the professions themselves.

This Comment suggests that neither profession has intentions of returning to days of yore where the bounds of professional expanses were primarily definitive. Part I of this Comment summarizes each profession's journey to the battlefield on which it now stands. The accounting profession, the relentless aggressor, has expanded its realm of coverage by conquering small areas of professional service that had previously been untransgressed. The legal profession, too, has enveloped many areas of expertise, but has remained resilient in the protection of its elite status. At the crossroads of this conflict is the corporate manager who is being whip-sawed by professional adversaries competing for corporate client confidence. Part II of this Comment identifies some significant obstacles<sup>7</sup> preventing unanimity between these two factions and proposes that these obstacles are largely based on historical perceptions of the professions that have long been transcended. Finally, Part III suggests that,

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*End of the Century*, 64 IND. L.J. 461, 461 (1989), providing that the legal profession is at the doorsteps of its most radical restructuring in history; *See also* ROBERT L. NELSON AND DAVID M. TRUBEK, NEW PROBLEMS AND NEW PARADIGMS IN STUDIES OF THE LEGAL PROFESSION, IN *LAWYERS' IDEALS/LAWYERS' PRACTICES* 1 (Robert L. Nelson et al. Eds., 1992), indicating that during the past two decades, the American legal profession has seen profound transformations in "its size and demographic composition, in the powers of the bar associations, and in the structures and managerial strategies of the organizations through which legal services are provided."

6. *See Written Remarks of James P. Holden* (visited Dec. 10, 1998) <<http://www.abanet.org/cpr/holden.html>>, indicating that attorneys at accounting firms are as qualified in their areas of practice as other attorneys are but are limited from performing legal services by professional restrictions imposed by the Bar.

7. This Comment does not, however, address the governmental or regulatory obstacles that may be advanced to prevent such a union.

to propel these professions past their current identity crises and to promote corporate confidence through the use of a comprehensive service provider, a harmonious integration of the two professions is inevitable.

## I. HISTORICAL BACKGROUND

The globalization of the economic markets, and the resulting competitive and regulatory concerns that accompany such an expansion, have added a myriad of complexities to corporate governance.<sup>8</sup> Consequently, corporate managers are increasingly relying on expert advice from sources external to the corporate structure.<sup>9</sup> Complications surrounding corporate governance today are more akin to the difficulties experienced by national leaders than by store managers.<sup>10</sup> As international boundaries are lowered,<sup>11</sup> competitive pressures increase and innovation accelerates at a pace found unmanageable by today's corporate leaders.<sup>12</sup> Goods and services are no longer the sole objects of commerce. Today, entire organizations have become articles of trade because of financial difficulties or because of "growth through acquisition" policies.<sup>13</sup> As a result of these developments, a range of problems has emerged. The spectrum of difficulties spans all aspects of modern business including financing, marketing, taxation and human resource management.<sup>14</sup>

Despite growing complexities involved with corporate management, investors continue to place high legal and ethical expectations on corporate

8. See Joyce Thomas, *The Future – It Is Us*, J. ACCT., Dec. 1998, at 23; consider, also, G. Joseph Votava Jr., *Spicing Up the Melting Pot: Traditional Financial Services Professionals, Attorneys and Accountants are Moving to the Same Place – Financial Planning*, FIN. PLANNING, Dec. 1, 1998, at 1, indicating that, in response to such trends, "holistic counselors" are required to possess a reasonable understanding of general business information in addition to relevant specialized skills.

9. See Yves Dezalay, Comment: *Territorial Battles and Tribal Disputes*, 56 MODERN L. REV. 792, 792 (1991), noting "It is as if the lines of demarcation between the spheres of competence of different forms of know-how are called into question as an indirect effect of the opening up of national frontiers."

10. See Morrison, *supra* note 1, at 72, analogizing modern corporate management to governance of a small country.

11. See Phillippa Cannon and Oliver Ralph, *Euro Stars: The Leading Tax Advisers*, INT'L TAX REV., Oct. 1998, at 34.

12. Dezalay, *supra* note 9, at 796.

13. *Id.*

14. *Id.* These problems are even more prevalent in small businesses that do not have the resources to possess internal "experts" in the form of internal audit departments, in-house counsel, tax specialists, etc. See also *Written Remarks of Kathryn Oberly* (visited Feb. 23, 1999) <<http://www.abanet.org/cpr/oberly1.html>>, suggesting that modern business demands require professionals experienced in all aspects of business, particularly environmental, engineering, zoning, insurance, tax and financing areas.

managers. "In the capitalist society, the most valuable commodity is trust."<sup>15</sup> Shareholder trust is the cornerstone of modern corporate governance. Investors expect that corporations will use their investments to generate fruitful returns and that corporate managers will act as fiduciaries in that regard.<sup>16</sup> As a result of these beliefs, entire bodies of law and codes of ethics have evolved for the protection of corporate investors.<sup>17</sup>

Corporate governance is predicated on a complicated set of agency relationships<sup>18</sup> intended to provide assurance to investors that corporate managers will act in the best interests of the corporation. Corporate managers, as agents of the corporation, are obligated to perform the duties prescribed by the corporation.<sup>19</sup> In performing these duties, corporate managers are increasingly dependent upon external advice from large pools of professionals, including legal counsel, accountants and others.<sup>20</sup> Furthermore, directors are expected to use due care<sup>21</sup> in performing their duties. Directors who exercise due care are generally protected from personal liability by general respect for sound business judgments.<sup>22</sup> Nevertheless, directors are frequently required to satisfy these obligations with demanding time limitations and stringent budget constraints. Consequently, corporate managers have become willing to pay a single advisor who can provide advice concerning multiple facets of a

15. Benjamin J. Stein, *Lessons for Leaders: Back to Basics*, CHIEF EXECUTIVE, Aug. 1, 1997, at 72.

16. *Id.* See also *Kavanaugh v. Kavanaugh Knitting Co.*, 123 N.E. 148, 151 (N.Y. 1919) stating that "directors are bound by all rules of conscientious fairness, morality and honesty in purpose which the law imposes as the guides for those who are under the fiduciary obligations and responsibilities". See also *Dodge v. Ford Motor Company*, 170 N.W. 668, 684 (Mich. 1919), indicating:

A business corporation is organized and carried on primarily for the profit of stockholders. The powers of the directors are to be employed for that end. The discretion of the directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes.

17. Stein, *supra* note 15, at 72.

18. The corporation has historically acted as the agent of its principal owners, the investors. Corporate management, then, assumes the role of agent for its employer, the principal corporation. See Stein, *supra* note 15, at 72, indicating that this disjoin between corporate management and the ultimate corporate owners should be blamed for scathing investor confidence through the payment of extraordinary management salaries, bonuses and incentive awards with little or no direct control.

19. MODEL BUSINESS CORPORATION ACT § 8.41 (1984).

20. MODEL BUSINESS CORPORATION ACT § 8.42(b) (1984).

21. See Charles Hansen, *The ALI Corporate Governance Project: Of the Duty of Care and the Business Judgment Rule*, 41 BUS. LAW. 1237, 1238 (1986), defining due care to include "ascertaining relevant facts and law before making [a] decision and . . . reasonable deliberation".

22. The business judgment rule is explained more thoroughly in *Smith v. Van Gorkam*, 488 A.2d 858, 872 (Del. 1985).

corporate issue rather than pay multiple advisors for the same advice.<sup>23</sup> It is this role that has been the crux of conflict between two great professions.

#### A. Accountants and Their Expanding Role as Business Advisors

Although historically opposed to drastic changes, the accounting profession has emerged from the shadow of its green eye shades and has stepped into the limelight shed by the role of business advisor. This illuminating migration, however, was not so much motivated by a desire to take center stage as it was a response to societal expectations. The Securities Act of 1933<sup>24</sup> and the Securities Exchange Act of 1934<sup>25</sup> were enacted by Congress in response to the stock market crash of 1929 in an attempt, not only to prevent securities fraud, but also to reinject confidence in investors that relied on financial information provided by publicly traded companies.<sup>26</sup> Registrants of new securities issues are required by the 1933 Act to file audited financial statements with the Securities and Exchange Commission (the "SEC").<sup>27</sup> Additionally, the 1934 Act mandates audited financial statements to be included in annual reports<sup>28</sup> and proxy statements<sup>29</sup> and, for those companies with securities listed on public stock exchanges, to be provided to the SEC periodically.<sup>30</sup> Until recent years, therefore, the majority of time spent by accountants related simply to auditing such information for the protection of unknowing investors.<sup>31</sup> Since the end of World War II, however, the percentage of time spent auditing has declined and the demand for other

23. John R. Wilson, *The Attorney-C.P.A. and the Dual Practice Problem*, 36 U. DET. L. J. 457, 459 (1959); Arthur J. Levy and W. D. Sprague, *Accounting and Law: Is Dual Practice in the Public Interest?*, 52 A.B.A. J. 1110, 1111 (1966). See also *Background Paper on Multidisciplinary Practice: Issues and Developments* (visited Feb. 23, 1999) <<http://www.abanet.org/cpr/multicomreport0199.html>>, indicating that clients are more frequently seeking coordinated advice from a variety of distinct professions. Moreover, most corporate leaders require teams of professionals from different disciplines to address many of the complex issues facing marketplace participants.

24. 15 U.S.C. § 77a (1998).

25. 15 U.S.C. § 78a (1998).

26. SUBCOMMITTEE ON REPORTS, ACCOUNTING AND MANAGEMENT, *The Accounting Establishment*, S. DOC. NO. 34, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 4 (1977), at 1.

27. 15 U.S.C. § 77aa (1998).

28. 15 U.S.C. § 78m(a)(2), 78m(b) (1998).

29. 15 U.S.C. § 78n (1998).

30. 15 U.S.C. § 781(b)(1)(J)-(L) (1998).

31. E. JONES, ACCOUNTANCY AND THE BRITISH ECONOMY, 1840-1980: THE EVOLUTION OF ERNST & WHINNEY 65 (London, 1981). For a summary of the primary role of an auditor, see Lorie Soares, Note: *The Big Eight, Management Consulting and Independence: Myth or Reality?*, 61 S. CAL. L. REV. 1511, 1515 (1988). Nevertheless, prior to World War I, the spectrum of services perceived by some to be in the purview of the accounting profession was bound only by the filed of engineering on one end and by the practice of law on the other. GARY JOHN PREVITZ, THE SCOPE OF CPA SERVICES 34 (1985).

accounting services has grown dramatically.<sup>32</sup> The accountants' role has been less confined to the issuance of a professional opinion on the annual financial statements of a company and has gradually expanded to include continual general business advice concerning all areas of a company.<sup>33</sup> Because of their knowledge of general business issues, their familiarity with a pervasive tax system, and their extremely analytical approach to problem solving, accountants have become primary advisors on questions of "financial policy, on the raising of capital, on distribution of profits, on costing and so forth."<sup>34</sup> "In filling the function of advisor or consultant to management, the accountant [has] enter[ed] fields of investigative work which mark a distinctive advance over the earlier conceptions of the scope of his service and which deal with the broad aspects of business as a whole."<sup>35</sup> Moreover, accountants have become expected to solve more complex issues regarding "general business, the scope of its operations, the soundness of its equipment and organi[z]ation, [and] the efficient and harmonious working of its management and staff."<sup>36</sup>

Such services, styled "consulting services"<sup>37</sup> by the American Institute of Certified Public Accountants ("AICPA"), were not induced entirely by the accounting profession's devotion to corporate success. As corporations have

32. See John C. Burton, *The Evolutionary Revolution in Public Accounting*, 52 BROOK. L. REV. 1041, 1041 (1987), indicating that "in a rapidly changing environment, seer users continue to retain those who provide them with forecasts and prescriptions for avoiding the threats of the future while expediting the visions of previously unforeseen opportunity." See also PREVITIS *supra* note 31, at 5.

33. Derek Matthews, *The Business Doctors: Accountants in British Management for the Nineteenth Century to the Present Day*, BUS. HIST., July 1, 1998, at 72; See MARK STEVENS, *THE BIG SIX* 18 (1992) concluding that the Big Six serve, not so much as accounting firms, but rather as "broad-based consulting practices" geared toward serving a complex web of corporate, governmental and institutional clients.

34. A.M. CARR-SAUNDERS AND P.A. WILSON, *THE PROFESSIONS* 219-220 (London, 1933). See also Burton, *supra* note 32, at 1042; Dezalay, *supra* note 9, at 797; William B. Gower, *Advisory Accountancy*, J. ACCT., Oct. 1920, at 268, indicating that, because business factors "are intimately related to and saturated with accounting concepts . . . that are almost unintelligible to laymen and difficult of comprehension even for lawyers," accountants are best able to fill the role of advisor.

35. ARTHUR ANDERSEN, *The Accountant's Function as Business Advisor*, J. ACCT., Jan. 1926, at 18-19. Andersen went on to predict that "the accountant of the future will prosper and consolidate his position in the business world in proportion to his breadth of vision and willingness to accept these responsibilities of larger service to industry." *Id.* at 21.

36. *Id.* at 21.

37. The American Institute of Certified Public Accountants ("AICPA") defines "consulting services" in STATEMENT ON STANDARDS FOR CONSULTING SERVICES § 5 (1992), as "professional services that employ the practitioner's technical skill, education, observations, experiences and knowledge of . . . activities related to [the] determination of client objectives, fact-finding, definition of the problems and opportunities, evaluation of alternatives, formulation of proposed action, communication of results, implementation and follow-up."

become increasingly cost-conscious<sup>38</sup> and as the expanse of potential audit clients has become more defined<sup>39</sup>, the pressure on accounting firms to reduce fees for recurring audit services has mounted.<sup>40</sup> Moreover, despite the appeal of the Chairman of the Securities and Exchange Commission, Arthur Levitt, for accounting firms to stop using advisory work as a means to offset losses produced by audit services,<sup>41</sup> the accounting profession has expanded its traditional roles in pursuit of improved revenues.<sup>42</sup> The potential revenue at stake has sent most accounting firms scrambling to retain professionals skilled in areas that have historically been beyond the reach of the accounting profession.<sup>43</sup> The era of the green eye-shaded accountant has generally been replaced by a new breed of business consultants educated in a diverse array of applications aimed at providing corporate managers with long-awaited professional advice. As the confines on the accounting profession have deteriorated, this advice has quickly grown to include "legal services."<sup>44</sup> As Joseph Sterrett, an early professional leader, predicted in 1909:

[A]ccountancy [will] merge with other existing professions, or with parts thereof, to form a composite profession including, perhaps, certain classes of work now conducted by engineers and possibly absorbing certain kinds of work now carried on by the legal profession and taking up the burden of that somewhat shadowy individual, the business advisor.<sup>45</sup>

38. M. STEVENS, *THE BIG EIGHT* 41, 86 (1981).

39. *The Accounting Establishment*, *supra* note 26, at 420.

40. STEVENS, *supra* note 33, at 21.

41. Jim Peterson, *Onwards and Upwards*, ACCT., Apr. 1, 1997, at 12.

42. See Tracey Miller-Segarra, *Accountants at the Gates: CPAs Lay Siege to Law Firms*, ACCT. TODAY, Nov. 23–Dec. 13, 1998, at 1, indicating that accountants have begun providing new services as traditional services have become increasingly commoditized. Business professionals and leaders are more often encouraging accountants to broaden their skills to include nonfinancial areas, a suggestion the accounting profession apparently considered during development of its "vision" of the future accounting profession. See Thomas, *supra* note 8, at 23.

43. See *Onwards and Upwards*, *supra* note 41, at 12, describing today's accounting graduate as a hugely versatile specialist, possessing "a paralegal's knowledge of accounting standards and other legalistic issues, and . . . in touch with technological change."

44. See *Tug of War*, INT'L ACCT. BULL. 5 (Mar. 25, 1998) listing "appraisals, financial planning, litigation support, alternative dispute resolution and . . . international tax practice" as examples of such services now being offered by accounting firms. See also Geoffrey C. Hazard, *The Ethical Traps of Accounting Firm Lawyers*, NAT'L L. J., Oct. 19, 1998, at A27, describing that accountants, among other professionals, have made a habit of selling legal services under different guises. See also David Segal, *Rivals Call Law Firms to Account; Tax Advisers Hope to Cross a Line and Compete for Legal Clients*, WASH. POST, Nov. 12, 1998, at F01, identifying the Big Five as the "world's largest law firms." Segal indicates that Ernst & Young and PricewaterhouseCoopers each employ more than 3,000 lawyers worldwide.

45. J. E. STERRETT, *The Present Position and Probable Development of Accountancy as a Profession*, J. ACCT., Feb. 1909, at 268.



The growth in the variety of services supplied by accounting firms has also been generated in part by the consolidation that has occurred in the profession during the past ten years. Until 1989, the accounting profession was dominated by the Big Eight.<sup>46</sup> In 1989, this elite group of “bean counters”, who, together, represented the world’s most powerful corporations, was reduced to the Big Six with the mergers of Ernst & Whinney and Arthur Young and Touche Ross and Deloitte, Haskins & Sells.<sup>47</sup> The accounting oligopoly was further reduced to five by the marriage of Price Waterhouse and Coopers & Lybrand announced in 1997.<sup>48</sup> The need to consolidate was generated through the globalization of financial markets and the increase in computerized communications.<sup>49</sup> Clients began to have a greater need for professional services on a global basis to match their own global expansion. Because of this geographic reach and larger pools of available resources, accounting firms began to explore service areas from which the profession has historically remained absent and, consequently, began being offered the role of comprehensive business advisor.<sup>50</sup>

#### B. *Attorneys and the Defense of a Profession*

Unlike the accounting profession,<sup>51</sup> however, the legal profession has remained largely resolute<sup>52</sup> and has primarily sought refuge in traditional practices.<sup>53</sup> Attorneys have traditionally been active in counseling business leaders with respect to corporate activities.<sup>54</sup> At the turn of the century, attorneys recognized the role of business advisor as a valuable channel to

46. The Big Eight included Arthur Andersen, KPMG Peat Marwick, Coopers & Lybrand, Price Waterhouse, Ernst & Whinney, Arthur Young, Touche Ross and Deloitte, Haskins & Sells.

47. STEVENS, *supra* note 33, at 13.

48. Elizabeth MacDonald and Joann S. Lublin, *Biggest Accounting Firm to Result, But Partners May Not Go Along*, WALL ST. J., Sep. 19, 1997, at A3.

49. STEVENS, *supra* note 33, at 212; *See also Background Paper on Multidisciplinary Practices: Issues and Developments*, *supra* note 23, indicating that even American Express and Century Business Services have entered the professional services arena by acquiring regional accounting firms in an effort to compete with the Big Five firms.

50. Matthews, *supra* note 33, at 72.

51. Dezalay, *supra* note 9, at 792, characterizing accountants as “instigators of the supermarket strategy”.

52. *See Tug of War*, *supra* note 44, contending that one of the largest detriments to the legal profession in the shadows of the 21<sup>st</sup> century and global marketplace is its own resistance to change.

53. *See NELSON, et al.*, *supra* note 5, at 1, suggesting that this retreat has been, perhaps, shaped by the sense of helplessness over external forces impacting the legal profession and its participants.

54. *See David A. Kessler, Professional Asphyxiation: Why the Legal Profession is Gasping for Breath*, 10 GEO. J. LEGAL ETHICS 455, 456 (1997) purporting that the purpose of the legal function itself is “interpreter of the ‘science of law’ and advisor to others.”

professional success.<sup>55</sup> Moreover, attorneys have long believed that normal industrial and business affairs required the assistance of the legal profession and the knowledge possessed only by members of its community.<sup>56</sup> Furthermore, corporate clients sought counsel from their attorneys because, in most instances, the notion that lawyers possessed some superior knowledge was true. Consequently, lawyers developed strong relationships with corporate clients and became part of regular business decision-making.<sup>57</sup> Because of the increasing complexities involved with effective corporate governance, however, attorneys have been forced to diversify to meet the demands of their clients.<sup>58</sup> Today, lawyers are almost as likely to be involved with economic, scientific, financial or political issues as mere legal ones.<sup>59</sup>

Societal and professional changes have greatly blurred the distinctions between two well-respected professions.<sup>60</sup> The convergence<sup>61</sup> of these historically distinct groups of professionals has occurred on the battlefields of

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55. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 36 (New York Oxford University Press, 1976); See Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1019 (1994), contending that the importance of corporations in American economic development and the lucrative legal fees associated with corporate counseling ignited the charge of the legal profession to the boardrooms and from the courtrooms.

56. *Id.* at 69.

57. *Id.* at 36.

58. *Id.* at 12, characterizing law as "a mirror of social forces" that "reflects what is in society . . . but often . . . channel[s] social problems and public issues into its own constricted framework of legitimacy and procedure." Dezalay, *supra* note 9, at 800. See also, Segal, *supra* note 44, suggesting that attorneys must begin to focus their efforts on improved quality of customer services rather than expressing concerns over encroachment by legitimate competitors. Consider, also, Pat Dunnigan, *Mixing Lawyers and Accountants*, FLORIDA TREND, Nov. 11, 1998, at 120, purporting that lawyers have already begun to address the potential business opportunities by offering business advisory and accounting services to their clients.

59. James W. Jones, *The Challenge of Change: The Practice of Law in the Year 2000*, 41 VAND. L. REV. 683, 684 (1988). See also Colin Croft, Note: *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1312 (1992) indicating that the current trend is for the delivery of legal services to be provided by collective organizations, employing professionals with a variety of backgrounds.

60. See Bruce Balestier, *Under One Roof: ABA Faces Arrival of Lawyers-Accountant Pairings*, N.Y.L.J., Nov. 19, 1998, at 5, suggesting that the difficulties surrounding the breadth of services provided by the accounting and legal professions arise from the inability to define the current practice of law which encompasses the use of professionals from various disciplines during the course of a project.

61. See *Lawyers and Certified Public Accountants: A Study of Interprofessional Relations*, 56 A.B.A. J. 776, 779 (1970), suggesting that this confrontation is due primarily to the "interrelationship of the financial and legal aspects of our society." See also *Written Remarks of Stefan F. Tucker* (visited Feb. 23, 1999) <<http://www.abanet.org/cpr/tucker1.html>>.

corporate boardrooms around the world.<sup>62</sup> The accountants, on one hand, have been accused of encroaching, through the offer of a wider array of professional services, into areas long considered the province of the legal profession.<sup>63</sup> Attorneys, on the other hand, have been charged with economic protectionism<sup>64</sup> wrought from the fear of competition.<sup>65</sup> The loser in this melee has been the corporate manager who is wedged between the expectations of and duties to restless investors and the assembly of accountants and lawyers fighting in the doorway to the corporate headquarters. The pursuit of lofty fees typically associated with consulting services, the desire to expand service capabilities to instill growth and the urge to restrict competitive pressures and to retain command over core competencies have come at the expense of corporate confidence in professionalism.<sup>66</sup>

The two adversaries are plagued by questions of whether these consulting services will supplant historical areas of expertise as the professions' defining roles in society or whether such services will merely supplement the array of services that have traditionally constituted their anatomies. Discussions regarding the integration of these professions have resurfaced and strategic unions of accounting and law firms may be inevitable. Nevertheless, members of the historical denominations have proposed various obstacles to a successful integration. These obstacles, however, largely underestimate public knowledge regarding professional services and fail to recognize the importance of client demands.

62. See Benny H. Hughes, Comment: *Outlook for the Lawyer-CPA*, 39 TEX. L. REV. 59, 59 (1960) proposing that the significance of the problem is "intensified by the fact that both professions have tremendous prestige in public life, and the activities of both professions are integrated into nearly every phase of personal and commercial relationships."; Levy and Sprague, *supra* note 23, at 1110.

63. John Gibeaut and James Podgers, *Feeling the Squeeze*, 88 A.B.A. J. (Oct. 1998).

64. *Written Remarks of Stefan F. Tucker*, *supra* note 61. ABA president, Jerome Shestack, however, contends that this issue is not an economic one but rather a matter of traditional values. Consider, also, *Tug of War*, *supra* note 44. Nevertheless, see Segal, *supra* note 44, at F01, valuing the market for legal services at \$100 billion a year and suggesting that such stakes are sufficient to raise a suspicion regarding the legal profession's motives.

65. Julie Dalton, *Tax Consulting: Legal Brain Drain?*, CFO, (November 1, 1997); Thomas Andrews, Article: *Non-Lawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L. J. 577, 579 (1989); Elizabeth MacDonald, *Texas Probes Andersen, Deloitte on Charges of Practicing Law*, WALL ST. J., B15 (May 28, 1998).

66. Professionalism includes the "application of an intellectual technique to the ordinary business of life, acquired as the result of prolonged and specialized training" CARR-SAUNDERS and WILSON, *supra* note 34, at 491, and a resulting degree of trust by the clients of such professionals because "their lack of training prevents them from evaluating [their] work." NELSON, et al., *supra* note 5, at 146.

## II. OBSTACLES TO INTEGRATION

### A. *Concerns for Public Protection*

Opponents of the integration approach to solving the problems that exist between the accounting and legal professions suggest an overarching concern for the protection of the public.<sup>67</sup> Arguments against dual practice have highlighted the inconsistency between the historical roles of accountant as impartial attestor and attorney as advocate.<sup>68</sup> This perceived conflict, it is argued, would deteriorate the public's perception of the professions' responsibilities and diminish the public's trust in professional ability. Moreover, the impracticability of an individual, or group of individuals, to gain necessary proficiency in both fields has also been advanced to support the contention that the level of service provided to the public will somehow be impaired.

#### 1. Irreconcilability of Professional Responsibilities, the "Schizophrenic Position"<sup>69</sup>

The most significant source of conflict between accountants and attorneys emanates from their fundamentally different duties.<sup>70</sup> Opponents to integration contend that the role of accountant as independent valuer or attestor is irreconcilable with the role of attorney as advocate.<sup>71</sup> Proponents of this "schizophrenic position" contend that the attorney's responsibility is to the

67. See, e.g., Levy and Sprague, *supra* note 23; Henry G. Burke, *Dueling Over The Dual Practice*, 27 MD. L. REV. 142 (1967); Copal Mintz, *Accountancy and Law: Should Dual Practice Be Proscribed?*, 53 A.B.A. J. 225 (1967); Gianluca Morello, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should be Permitted in the United States*, 21 FORDHAM INT'L L. J. 190 (1997).

68. See Levy and Sprague, *supra* note 23, at 1113, indicating that "there is the question of whether a lawyer with a duty of loyalty to a client can function properly as a CPA with a duty of impartiality."

69. See *Legal Ethics: Attorneys Who Are Also Certified Public Accountants May Properly Practice Both Professions in the Same Office*, 63 HARV. L. REV. 1457, 1458 (1950), describing that a dual practitioner has a "schizophrenic position as a lawyer with a duty of loyalty to his client and as a CPA with a duty of impartiality."

70. *Tug of War*, *supra* note 44.

71. Levy and Sprague, *supra* note 23, at 1113; Bruce Balestier, *Recent ABA Hearings Recognize Potential Arrival of Lawyer-Accountant Privilege*, LEGAL INTELLIGENCER 7 (Nov. 23, 1998). See also COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, ABA, INFORMAL OPINION 86-1519 (1986), indicating that "the public interest is best served by assuring that clients are represented by lawyers who, as members of a regulated profession, are an arm of and subject to the courts [and] are committed to court approved standards of ethical and professional conduct. . ."

client, but the accountants duty is to the public.<sup>72</sup> Because accountants have historically been viewed as protectors for the investing public from fraudulent or misleading financial information, a duty of independence has generally been imposed upon the profession.<sup>73</sup> “[Independence] is partly synonymous with honesty, integrity, courage, character. It means, in simplest terms, that the certified public accountant will tell the truth as he sees it, and will permit no influence, financial or sentimental, to turn him from that course.”<sup>74</sup> Nevertheless, the AICPA Code of Professional Conduct requires independence only in circumstances in which the accountant performs audit or other attest functions.<sup>75</sup> In all other instances, “a member should maintain objectivity and avoid conflicts of interest.”<sup>76</sup> Objectivity has been regarded as the “distinguishing feature of the [accounting] profession” and imposes “an obligation to be impartial, intellectually honest, and free of conflicts of interest.”<sup>77</sup>

Proponents of the “schizophrenic position” argue that failure to exhibit objectivity clouds professional judgment because accountants become too involved with client management.<sup>78</sup> Consequently, the public may perceive that management is able to sufficiently influence the accountant such that adherence to professional responsibilities is no longer maintained.<sup>79</sup> The

72. John R. Wilson, *supra* note 23, at 457; Consider, however, WILLIAM A. PATON, *Earmarks of a Profession – and the APB*, J. ACCT. 41 (Jan. 1971), contending:

The notion that the goal of the professional accountant is public or social service is nonsense. His function is to provide the best possible service to his specific clients, the people who pay for his efforts. And in doing this his attitude is not one of independence or aloofness; instead he should be endeavoring to become as fully acquainted as practicable with each client’s affairs and problems and be prepared to give constructive advice on his internal accounting methods and all phases of financial measurement, review and planning. . . . Of course, this doesn’t imply that the accountant should condone or participate in any kind of crooked or destructive techniques. . . . This point would be taken care of by emphasizing competence and integrity rather than independence and public service.

73. See Lorie Soares, *supra* note 31, at 1516, proposing that “audits by objective third parties, such as CPAs, inspire investor confidence in the financial markets by giving credence to statements made by the management of publicly owned companies.”

74. JOHN L. CAREY, *PROFESSIONAL ETHICS OF PUBLIC ACCOUNTING* 7 (New York, 1946); MAURICE E. PELOUBET, *Independence – A Blessed Word*, J. ACCT., Jan. 1944, at 69, contending that “[i]t is not really independence, which some glib and uninformed writers discuss so freely, it is rather integrity, which is so necessary to the practice of a profession.”

75. AICPA Code of Professional Conduct, Article IV, § 55.03 (1998). AICPA Statements on Standards for Attestation Engagements No. 1 § 100.01 defines an attest engagement as “one in which a practitioner is engaged to issue or does issue a written communication that expresses a conclusion about the reliability of a written assertion that is the responsibility of another party.”

76. *Id.*

77. See AICPA Code of Professional Conduct, § 55.01 *supra* note 75.

78. Lorie Soares, *supra* note 31, at 1525.

79. *Id.* at 1517.

conflict has best been summarized by the Ethics Committees of the Baltimore and Maryland Bar Associations as follows:

The lawyer is an advocate whose duty it is sincerely to present his client's cause and the facts thereof, in the best and most convincing manner, in accord with his client's interests. On the other hand, the Certified Public Accountant is pledged to give the public an uncolored, impartial, and full statement and analysis of his client's financial situation. He does not advocate, but certifies to the exactitude of his findings upon which the public has a right to depend. One who acts in the dual capacity . . . may therefore be continually confronted with a conflict of duty to his client and to the public and faced with a temptation which the nature of man finds increasingly difficult to resist. The client is entitled to honest, energetic advocacy from his lawyer and on the other hand to impartial exactitude in accounting from his CPA.<sup>80</sup>

The expanse of occasions in which attorneys and accountants are being consulted prohibit the conclusions that attorneys are always advocates for their clients and that accountants must always remain impartial.<sup>81</sup> The notions that attorneys are advocates and accountants are attestors represent fictions around which stereotypical conclusions have been drawn.<sup>82</sup> Advocacy implies a conflict.<sup>83</sup> Nevertheless, arguments could hardly be fostered that, by drafting a will, an attorney is acting as an advocate. Perceptions of the roles of the dutiful barrister in a courtroom defending a client's position have been replaced by the office attorney who is more likely to supervise estates, administer wills, draft simple contracts or perform similar specialized tasks.<sup>84</sup> These tasks hardly seem to require the extreme partisanship long produced as the defining characteristic of the legal profession.<sup>85</sup> Rather, such *devoir* demand a keen sense of impartiality, a characteristic that public perceptions of attorneys have historically lacked.<sup>86</sup>

Similarly, assumptions regarding the accounting profession are fallacious given the bounds of responsibilities undertaken by today's practitioners.<sup>87</sup>

80. DAILY REC. (Baltimore), Apr. 11, 1966, at 3.

81. See Louis S. Goldberg, *Dual Practice of Law and Accountancy: A Lawyer's Paradox*, 1966 DUKE L. J. 117, 133 (1966), questioning whether lawyers can meet the rigors of modern practice without remaining impartial on certain occasions, for example, when drafting intricate contracts, providing opinions on abstracts of title and participating in complex negotiations.

82. Burke, *supra* note 67, at 148.

83. *Id.* at 149.

84. See NELSON, et al., *supra* note 5, at 34, indicating that "the emergence of the firm [of lawyers] represents the ascendancy of the office lawyer and the displacement of the advocate as the paradigmatic professional figure."

85. See Croft, *supra* note 59, at 1300.

86. See Mintz, *supra* note 67, at 230, indicating that objectivity is an indispensable characteristic of an attorney. Objectivity, provides an attorney with the ability to decide when to be impartial and when and to what extent to be loyal.

87. Burke, *supra* note 67, at 148.

Accountants have slowly migrated from merely certifying a client's financial position to areas that require promotion of client interests.<sup>88</sup> Clients frequently employ their accountants to defend particular tax positions before the Internal Revenue Service ("IRS") or to explain certain accounting applications to the Securities and Exchange Commission ("SEC"). Advocacy, it has been contended, requires that a practitioner "act in such a way that within the bounds of the law and applicable professional standards maximizes the interests of his client."<sup>89</sup> Consequently, advocacy encompasses "loyalty, fiduciary responsibility, and candor to the client" and requires "diligence to the client's needs, as well as zeal in enforcing the client's interests within the adversarial framework."<sup>90</sup> In representing clients before both the IRS and SEC and in performing various other professional services, accountants frequently operate to further the interests of their clients within the bounds of law and guidelines of the profession.<sup>91</sup> Moreover, the distinction between the roles of accountants in many instances, including positing clients' stances before the IRS and SEC, are indistinguishable from those of attorneys in similar capacities.

Contentions that public confidence in professional service providers would decline with an integration of the accounting and legal professions because of the "schizophrenic" allegiance of such providers are misguided. Historical perceptions among business leaders regarding the traditional roles of accountants as attestors and attorneys as advocates have long been abandoned. The roles of accountants have metamorphasized primarily as result of changing market conditions and eroding views that accountants are merely auditors.<sup>92</sup> The extent to which business managers have pursued business consulting services from accountants confirms that the role of attestor is but one area of expertise acknowledged by the public. Public attitudes have gradually changed to acknowledge that tomorrow's business environment will require business advisors to simultaneously possess the historically defining characteristics of both of these professions: impartiality and advocacy.

## 2. Inability to Attain Proficiency

The extent to which the complexities of the fields of law and accountancy have grown over the past century is undeniable. The number of federal and state governmental agencies and regulations with which attorneys and accountants regularly interact is representative of the demands placed on these

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88. See PREVITZ, *supra* note 31, at 72–73.

89. Croft, *supra* note 59, at 1300.

90. *Id.*

91. Goldberg, *supra* note 81, at 133.

92. Peterson, *supra* note 41, at 12; see also Dezalay, *supra* note 9, at 795, indicating that retaining these "ideological postulates. . . is no more than the product of [] history."

professions.<sup>93</sup> Advocates for retaining separateness contend that the integration of the legal and accounting professions would create a body of knowledge so expansive as to escape the grasp of even the most astute scholar.<sup>94</sup> “The application of an intellectual technique to the ordinary business of life, acquired as the result of prolonged and specialized training, is the chief distinguishing characteristic of [a] profession[.]”<sup>95</sup> Questions arise, therefore, over whether, in attempting to protect and enhance the public interest, an individual, or group of individuals, could become sufficiently equipped to render advice concerning both areas.<sup>96</sup>

Advancement of the view that the breadth of knowledge required by the consolidation of the accounting and legal curricula would become so unmanageable is naïve. At present, few, if any, accountants or attorneys could honestly pronounce a complete understanding of either subject.<sup>97</sup> Most criminal defense attorneys do not advance a comprehensive knowledge of corporate law and would be unable to properly advise a client on drafting articles of incorporation without further consultation.<sup>98</sup> Because practitioners do not aim to hold themselves out as “comprehensively qualified,” accountants and lawyers necessarily tend to “narrow [their] practice and maintain[] a special or continuous competence only in such fields as the practice [they] accept[] requires.”<sup>99</sup> Practitioners confronted with unfamiliar circumstances frequently seek assistance from associates who are more proficient or simply undertake the necessary research themselves.<sup>100</sup> Both accountants and attorneys, although licensed in their respective fields, have historically chosen specific areas within each field in which to concentrate. Consequently, the threat that, by integrating the accounting and legal professions, the knowledge required would be so comprehensive as to preclude entry into the profession is chimerical.<sup>101</sup>

93. Burke, *supra* note 67, at 150.

94. *Id.*; Goldberg, *supra* note 81, at 132.

95. CARR – SAUNDERS and WILSON, *supra* note 34, at 491.

96. William Cohen and Bernard L. Lewis, Comment, *The Attorney–Accountant: Ethical Problems in the Joint Practice of Law and Accounting*, 3 U.C.L.A. L. REV. 360, 369 (1955–56).

97. Wilson, *supra* note 23, at 461.

98. See NELSON, et al., *supra* note 5, at 48, indicating that “the practice of law has become more specialized. Within large firms, specialization has become more intense and the work of various levels more differentiated.” Moreover, because of the complexity involved with much of the work performed by large law firms, the demand for more “intensive lawyering” has erupted.

99. Mintz, *supra* note 67, at 227.

100. *Id.*; see also Clive Parritt, *Raw Deal from ‘One–Stop Shops’*, TIMES (London), May 1, 1997, at 32, asserting that “professional practice has always been a collegiate activity in which people with similar skills and ideas work together and share experiences in order to build the combined knowledge base of the practice”; Cannon and Ralph, *supra* note 11, at 34.

101. See Balestier, *supra* note 71, at 7, purporting that the public demands the performance of legal services by those members of the Bar that are most qualified.



Competition, conversely, would provide a meaningful weight sufficient to balance the ability to sell particular professional services and the proficiency necessary to perform such services. Client confidences will only be enhanced by a professional services provider capable of providing the expertise that the practitioner purports to possess.<sup>102</sup> Inadequate service will force business leaders to seek new sources of advice, and the threat of competition will encourage professionals to maintain proficiency in performing those services.

### *B. Professional and Ethical Considerations*

In addition to a concern for public protection, opponents point to a comprehensive list of professional and ethical considerations that prohibit the potential for an integrated approach.<sup>103</sup> Concerns over professionalism and questions regarding the demarcation of the two professions are not a consequence of recent developments. In 1928, the ABA adopted Canons 33 through 45 of the Canons of Ethics.<sup>104</sup> Canon 33 required the following:

In the formation of partnerships for the practice of law, no person should be admitted who is not a member of the legal profession, duly authorized to practice, and amenable to professional discipline. No person should be held out as a practitioner or member who is not so admitted. . . . Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where a part of the partnership business consists of the practice of law.<sup>105</sup>

Canons 34 and 35 continued the theme set forth in Canon 33 by prohibiting fee-splitting between lawyers and nonlawyers<sup>106</sup> and by cautioning against the subordination of the duties of an attorney to any lay personal or corporate intermediary.<sup>107</sup> For the forty years that followed, the ABA Committee on Professional Ethics and Grievances consistently applied the Canons to prohibit almost every form of business association between lawyers and nonlawyers that involved the practice of law.<sup>108</sup>

102. *Id.*, contending that sophisticated clients may be willing to choose lawyers associated with an accounting firm because of the advantages stemming from such a relationship. Such clients would be capable of determining whether such services are sufficient or whether “independent” legal services are necessary.

103. Levy and Sprague, *supra* note 23, at 1113. *See also*, Burke, *supra* note 67, at 145; Mintz, *supra* note 67, at 228.

104. 53 REPORTS OF THE A.B.A 119–130 (1928). Nevertheless, *see* Lisa Brennan, *Past is Firms’ Prologue*, NAT’L L. J., A01 (Mar. 22, 1999), forecasting that bar organizations will overhaul the rules prohibiting such partnerships in the next century and that, consequently, national and global firms will be able to service clients with international issues.

105. *Id.* at 778.

106. *Id.*

107. *Id.* at 779.

108. Andrews, *supra* note 65, at 587.

In 1969, however, a new Model Code of Professional Responsibility<sup>109</sup> (hereinafter, the "Model Code") replaced the Canons.<sup>110</sup> Moreover, in 1983, the ABA adopted the Model Rules of Professional Conduct (hereinafter, the "Model Rules") intended to replace the Model Code.<sup>111</sup> The restrictions on associations between lawyers and nonlawyers, nevertheless, remained relatively unchanged.<sup>112</sup> The provisions of the Model Rules regarding interactions between lawyers and nonlawyers are substantially similar to those pronounced by the Model Code.<sup>113</sup> Although the Model Rules significantly limit the ability of nonlawyers to encroach upon the territory historically governed by the legal profession, the Model Rules fail to restrict the breadth of "legal" advice.<sup>114</sup>

In August, 1998, the new president of the ABA appointed a commission of attorneys to investigate recent trends involving the acquisition of law firms by international accounting firms.<sup>115</sup> Attorneys, ABA President Philip S. Anderson indicated, have been presented with new issues that have been raised as the Big-Five accounting firms have "added legal services to their list of client offerings."<sup>116</sup> Because the number of attorneys recruited by U.S. accounting firms from leading law firms has increased since the early 1990's, the ABA has initiated the Commission on Multidisciplinary Practice to determine the extent to which such attorneys are practicing law.<sup>117</sup>

109. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY PMBL. AND PRELIM. STATEMENT (1981)(hereinafter, "MODEL CODE").

110. 94 REPORTS OF THE A.B.A. 389-392, 729 (1969).

111. A.B.A. CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE A.B.A. HOUSE OF DELEGATES ii (1987)(hereinafter, "MODEL RULES").

112. Nevertheless, see *Practice Guide – Partnership with Non-lawyers*, LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) NO. 91, 401 (1995), available on Westlaw, ABA-BNA database noting that Washington, D.C. does permit the joining of lawyers and nonlawyers in the practice of law.

113. See MODEL RULES, *supra* note 111, Rule 5.4; MODEL CODE, *supra* note 109, DR 3-102(A)(fee-sharing), DRs 3-103(A), 5-107(C)(lawyer-nonlawyer partnership), and DR 5-107(B)(independent professional judgment).

114. See MODEL RULES, *supra* note 111, Rule 2.1, allowing an attorney, "[i]n rendering advice, . . . [to] refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." The Comment to Rule 2.1 adds:

Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

115. ABA President Philip S. Anderson Appoints Commission on Multidisciplinary Practice (visited Dec. 10, 1998) <<http://www.abanet.org/cpr/newsrelease/multicom.html>>.

116. *Id.*

117. *Id.*

The ABA has supported its contention prohibiting the association of lawyers and nonlawyers in the practice of law by asserting that such efforts would constitute dual practice. Allowing the practice of both accounting and law would promote the promulgation of a specialty and would legitimize the use of one profession as a “feeder” for the other.<sup>118</sup> Additionally, the absence of privileged communications for nonlawyers would substantially undermine public reliance on administration of professional responsibilities. These assertions buttressing the ABA resilience to integration have been advanced in the name of public protection and the installation of stronger client confidence.

### 1. Dual Practice

During the 1940's, the National Conference of Lawyers and Certified Public Accountants (hereinafter, the “National Conference”)<sup>119</sup> was established to collaborate on problems common to both professions. In 1946, the National Conference proposed several questions<sup>120</sup> concerning “dual practice.”<sup>121</sup> In response, the AICPA declined to oppose the dual practice,<sup>122</sup> and has consistently retained its position since that time. The ABA, on the other hand, issued Formal Opinion 272 in 1946 condemning dual practice from a single office, but not from separate offices.<sup>123</sup> In 1961, however, the ABA Ethics Committee superceded Opinion 272 by promulgating Opinion 297, which requires that a dually qualified individual “choose between holding himself out as a lawyer and holding himself out as an accountant.”<sup>124</sup>

“The attempt to attack the dual practice on the ground that dual holding out is the announcement of a specialty seems to hark back to the time when accounting may have been regarded as ‘a handmaiden to the legal

118. Burke, *supra* note 67, at 143.

119. The National Conference of Lawyers and Certified Public Accountants consisted of a committee of lawyers selected by the ABA and a committee of certified public accountants selected by the American Institute of Accountants, the predecessor of the AICPA.

120. The questions were presented to the ABA Ethics Committee and to the Professional Ethics Committee of the AICPA. Responses to these questions are included in 83 J. ACCOUNTANCY 171–175 (1947).

121. See GEOFFREY C. HAZARD, JR., et al., *THE LAW AND ETHICS OF LAWYERING* 983 (2d ed. 1994)(defining dual practice). Dual practice occurs when “(1) a lawyer, who is also qualified in accounting, engineering or some other field, holds herself out as practicing in a dual capacity, and (2) a lawyer forms a partnership with a nonlawyer such as an accountant.”

122. *Id.* at 172.

123. ABA Comm. on Professional Ethics and Grievances, Formal Op. 272 (1946).

124. ABA Comm. on Professional Ethics and Grievances, Formal Op. 297 (1961). Nevertheless, consider *Texas Panel Dismisses Complaint Against Arthur Andersen* (visited Dec. 16, 1998) <[http://www.arthurandersen.com/Firmwide/about\\_aa/news/txupl.asp](http://www.arthurandersen.com/Firmwide/about_aa/news/txupl.asp)>, announcing the dismissal of allegations that Arthur Andersen had engaged in the unauthorized practice of law. The dismissal followed an eleven-month investigation into the firm's involvement in the preparation of legal documents and tax opinions, the formation and registration of companies and the employment of licensed attorneys.

profession.”<sup>125</sup> Self-touting, or self-laudation has historically been feared as a proclamation by a professional, or group of professionals, skilled in accounting and law that they can perform as effectively as an individual skilled in a single capacity.<sup>126</sup> This argument, however, fails to consider that the individual, or group of individuals, has been trained and legally admitted into both professions. Professionals, therefore, would be asked to utilize the skills obtained from training as accountants and attorneys, but to refrain from publicly announcing membership of the profession in which those professionals qualify to practice.<sup>127</sup> In an environment in which specialization has become so pervasive, such prohibitions against identification of skills seem to promote more public distrust than confidence.

To further protect the public from inappropriate business solicitation, Opinion 297 prohibited practitioners from using their combined practices to “feed” their law practices. The fear of “feeding” is one of “unfair competition.”<sup>128</sup> Opponents of such “ancillary business activities”<sup>129</sup> contend that such businesses compromise judgment, endanger confidentiality, create conflicts of interest and generally violate the ethical guidelines.<sup>130</sup> Nevertheless, “[an] honest practitioner . . . will after a moment’s reflection on his own career, agree that every activity he engages in in his daily life, in effect, feeds his practice. It is his associations and the impressions he gives to the public that brings his clients to his door.”<sup>131</sup> The “feeding” argument restricting “ancillary businesses,” therefore, seems to merely be a economic ploy used by practitioners unwilling to adapt to the complex needs of business leaders<sup>132</sup> and the competitive threats posed by alternative business forms.

## 2. Absence of Protected Communication

One privilege of the legal profession that the accounting world has not enjoyed until recently, however, is that of protected communications between practitioner and client. The absence of an absolute privilege, some argue, prevents integration because of the proliferation of distrust among clients that

125. Burke, *supra* note 67, at 147, quoting J. ACCT., Mar. 1967, at 43.

126. DAILY REC. *supra* note 80, at 4.

127. Burke, *supra* note 67, at 146.

128. Goldberg, *supra* note 81, at 125.

129. In 1994, the ABA adopted Model Rule 5.7 addressing such services. Rule 5.7(a)(1) states that “[a] lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services . . . if the law-related services are provided . . . by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients . . .”

130. See HAZARD, JR., et al., *supra* note 121, at 983.

131. Wilson, *supra* note 23, at 459.

132. Gary A. Munneke, *Dances With Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDAM L. REV. 559, 577 (1992).

would occur.<sup>133</sup> Chief Justice Warren Burger, in allowing the IRS access to accountants' working papers in *United States v. Arthur Young & Co.*,<sup>134</sup> announced that, "by certifying the reports that...depict a corporation's financial status, the independent auditor assumes a public responsibility transcending away any employment relationship with the client."<sup>135</sup> The decision, therefore, centered on the historical role of accountant as independent attestor and balked at situations in which accountants acted as advocates for their clients.<sup>136</sup> Attorneys express additional concerns that nonlawyer partners of an integrated firm will learn of client secrets and will somehow waive communication privileges.<sup>137</sup> Consequently, no accountant-client privilege is currently recognized at common law. Therefore, accountants' abilities to secure their clients' trust and thereby provide meaningful advice is hampered by the rules governing protected communications.

The perception that the purview of the accounting profession extends only to the public, however, inappropriately limits the profession's ability to provide the comfort necessary to gain client confidence. The lack of protection for client communications involving consultative and tax services adds fuel to the fire currently burning between the accounting and legal professions, especially given the overlap in numerous areas.<sup>138</sup> Tensions over protection for attorneys, but not for accountants, have continued as the differentiation of services provided by these professions has weakened.<sup>139</sup> Moreover, although the Court restrained from acknowledging a privilege for accountants in *Arthur Young & Co.*, the Court did leave room for Congressional activity in this area.<sup>140</sup>

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133. Levy and Sprague, *supra* note 23, at 1113; *see also Tug of War*, *supra* note 44 acknowledging that "perhaps the Bar's best consumer-oriented argument [is that] while accountants may be cheaper and faster, they cannot offer broad-ranging confidentiality or loyalty to their clients and the protections those duties try to guarantee." Although no client privilege has existed previously, the AICPA mandates that its members recognize the confidentiality of all client information. *See* AICPA Code of Professional Conduct § 301.01 (1998).

134. 465 U.S. 805 (1984); Mark A. Segal, *Accountants and the Attorney-Client Privilege*, J. ACCT., April 1, 1997, at 53, acknowledging that the absence of privilege communications between accountants and their clients threatens the candor with which accountants can interact with their clients and also detracts from the overall quality of service provided by accountants.

135. Stephen Wermiel, *Justices Allow Review by IRS of Audit Papers*, WALL ST. J., Mar. 22, 1984, at 2.

136. *Tug of War*, *supra* note 44.

137. Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 405(1988).

138. MacDonald, *supra* note 65, at B15.

139. *Id.*

140. *Tug of War*, *supra* note 44.

On July 22, 1998, Congress passed the Internal Revenue Service Restructuring and Reform Act of 1998<sup>141</sup> that creates a confidential privilege between clients and the accountants who represent them before the IRS.<sup>142</sup> This development has given clients the ability to confide in their accountants with regard to tax matters to the same extent as they do their attorneys.<sup>143</sup> Although the privilege is currently limited to non-criminal tax proceedings before the IRS or federal court,<sup>144</sup> the acknowledgement of such protection has evened the playing field between attorneys and accountants in the tax arena and has undoubtedly raised several brows over the potential expansion of such a privilege in the future.

### III. AN INTEGRATED SOLUTION

The acknowledgement of privileged communication has been but one stepping stone towards integration between these two stoic professions. These professions share common goals,<sup>145</sup> and the evolution of each of the professions has closely mirrored that of the other. Furthermore, recent developments indicate that the degree to which these two bodies of knowledge overlap has become so significant that the two professions are almost indistinguishable in many instances. The solution to current tensions between the professions concerning the scope of services could, with proper vision and guidance, be supplanted with a working union designated at providing corporate clients with the service that they always expect, but rarely receive.<sup>146</sup>

The model for integration should generally resemble the existing structure of the healthcare system. The current healthcare structure revolves around a large system of hospitals and healthcare networks. These hospitals and healthcare networks are supported by various professionals, paraprofessionals, clerical and administrative staff. Most professionals involved with healthcare have developed a specialty, an area of medicine in which those particular individuals excel. Nevertheless, each of these professionals, although a player in a larger team of medical support providers, is an individual practitioner, held

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141. 26 U.S.C.A. § 7525(a)(1) (1998).

142. *IRS Restructuring Act Includes CPA/Client Privilege*, J. ACCT., Sep. 1998, at 83.

143. *Id.*

144. 26 U.S.C.A. § 7525(a)(2) (1998).

145. Levy and Sprague, *supra* note 23, at 1111, indicating that regardless of whether integration ultimately occurs, the delivery of qualified professional service to the public is of utmost importance.

146. Consider Cannon and Ralph, *supra* note 11, at 34, quoting Alfred Fink, a tax partner at PricewaterhouseCoopers in Paris who stated that a "bank developing a financial product in the UK wants to know if it is possible to roll this product out around the world and does not want to consult 15 different law firms. A company selling equities over the Internet in the US wants to start selling into Europe and wants fast, high quality advice. The market for traditional legal services probably is saturated, but the market for an integrated service is not."

to the standards set by the professional norm. Furthermore, in certain geographic areas, the complexities of illnesses encountered are not as significant as in other areas. Consequently, in those areas in which the depth of knowledge is not as valuable as the breadth of knowledge, general practitioners provide necessary medical attention to the affected patient. In times of chronic illness, a general practitioner is able to refer a patient to a nearby specialist that can provide required treatment. Necessarily, therefore, the degree of professionalism, the cost of service and the requisite qualifications will be guided by market demand.<sup>147</sup>

To illustrate the operation of the integrated “entity model” approach,<sup>148</sup> consider a patient that suffers a heart attack. The patient upon entering the emergency room will be attended to by a physician that will be capable of objectively making an initial assessment of the situation (i.e., the patient’s heart condition) and will be able to supply the treatment necessary to temporarily remedy any discomfort. Assume that the physician suggests surgery as the only solution for recovery. The emergency room physician, though not proficient to actually perform the surgery, will be familiar enough with the patient’s situation and with the extent of available services to recommend such a procedure.

A team of cardiologists, anesthesiologists, nurses and others will be identified to perform the surgery because of the depth of their expertise of specific services. Furthermore, the extent of each specialist’s responsibilities will be clearly defined. Each member of the team will be responsible for a particular task; however, a successful operation will require unison between all professionals. These professionals must understand the tasks that the others are performing, but a comprehensive understanding of all procedures performed during surgery is not expected. Rather, the practitioner will be expected to perform the function in which that individual has specialized. Nevertheless, the patient must be able to rely on the hospital, as an entity, to maintain a staff of professionals knowledgeable regarding the procedure to which the patient will be subjected.

After the surgery, the patient will be relieved to the care of various nurses, physicians, therapists and lab technicians to ensure that recovery is expedient and complete. The focus of after-surgery medical assistance will include, in addition to returning the patient to normal daily activities, searching for the cause of the ailment to prevent future similar episodes. To completely understand the patient, the practitioner must implore into very personal details of the patient’s life. Consequently, a significant amount of trust is mandatory to identifying the source of the ailment and to proposing a long-term solution

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147. *Id.*

148. See PREVITS, *supra* note 31, at 148, proposing an “entity model” as the prototype against which the future accounting profession should be measured.

to the problem. This trust will have been gained by the past practices of the hospital and by the patient's faith that the services received will be the highest quality. If the patient is unsatisfied with the cardiologist's performance or the hospital's overall service, for example, then the patient will likely seek an alternative source of assistance for future services.<sup>149</sup>

The integration of accounting and law is similar to the integration of a wide array of physicians who have specialized in particular areas of medicine. The field of professional services must assimilate the field of medicine whereby individual professionals collaborate for a specific purpose.<sup>150</sup> Yet each of these professionals is measured by the reasonable methods used by similar specialists.<sup>151</sup> Moreover, the professionals, although advocates for their patient's best interest, possess enough objectivity to suggest and perform the most appropriate service available. Furthermore, to ensure a long-term relationship so as to better understand their clients and provide on-going business advice, a high degree of confidence is necessary.<sup>152</sup> Corporate governance is spattered with societal, governmental, technological and competitive pressures. The degree of complexity that will characterize future corporate governance requires professional service providers that employ the services of a variety of specialists. This diversification in service capabilities best tracks the changes taking place in corporate development.

#### CONCLUSION

The challenges of the next century compel the need for a professional service provider that can perform the vast array of functions typical of a complex global marketplace and that can legitimately perform such services while maintaining corporate confidence. Societal and governmental demands, however, have placed lofty penalties on ill-advised corporate decisionmaking.

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149. See *Texas Panel Dismisses Complaint Against Arthur Andersen*, *supra* note 115, for comments made by Arthur Andersen spokesman, John Neimann, proclaiming that the "public is entitled to a choice between competent providers of [] services". Moreover, See *Written Remarks of Stefan F. Tucker*, *supra* note 61, and Angela Wissman, *ABA Ponders Meaning of Legal Life*, ILLINOIS LEGAL TIMES, Mar. 1999, at 1, suggesting that professionals should be regulated by external forces such as client and customer demand and expectations.

150. See *Written Statement of Neil Cochran* (visited Feb. 23, 1999) <<http://www.abanet.org/cpr/cochran1.html>>, contending that teaming arrangements reduce transaction costs, promote client communication and produce integrated work products that encompass all aspects of an issue.

151. See *Written Remarks of Kathryn Oberly*, *supra* note 14, suggesting that the Model Rules should focus on the individual practitioner rather than the organization in which the professional practices. Such a change may allow a variety of feasible practice structures aimed at providing integrated, comprehensive professional services.

152. See Votava, *supra* note 8, at XXX, indicating that "advisers who seek to understand what their client wants to achieve-and can earn and maintain the client's trust-will find success in the emerging knowledge-based society."



Consequently, corporate management has historically sought refuge by obtaining consulting advice.

In response to the lucracy of the market potential and because of the deafening cries of corporate clients, the accounting and legal professions have successfully stepped into the ring of consultants. These two professions have become the preeminent sources of advisory services worldwide. Nevertheless, this ascendance has resulted in an overlap in the service capabilities provided by accountants and attorneys. Both professions now stand in disarray regarding the definition and extent of their services. In response to this confusion and in an attempt to instill a sense of confidence in corporate clients, the integration of the accounting and legal professions is unavoidable.

Integration requires professional service conglomerates capable of addressing a variety of distinct, yet interrelated, problems encountering corporate governance. Public perceptions based on historical distinctions between the accounting and legal professions, and the roles those professions play in society, must be altered to include the demands of corporate clients. The barrage of complaints concerning the scope of coverage levied between the professions must yield to a consolidated effort to instill confidence in corporate clients by providing those clients with thorough and knowledgeable advice on which to base crucial business decisions.

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